Sheinberg, Samuel I.

From: HSRHelp
Sent: Friday, August 18, 2023 9:09 AM
To: Walsh, Kathryn E.; Berg, Karen E.; Musick, Vesselina; Shaffer, Kristin; Sheinberg, Samuel I.; Six, Anne; Fetterman, Michelle
Subject: FW: Valuation of Newly Issued Stock

From: Whitehead, Nora <nwhitehead@ftc.gov>
Sent: Friday, August 18, 2023 9:09:21 AM (UTC-05:00) Eastern Time (US & Canada)
To: [redacted]
Cc: HSRHelp <HSRHelp@ftc.gov>
Subject: RE: Valuation of Newly Issued Stock

We agree that these should be considered non-publicly traded securities, and that their value is the FMV as determined under 801.10(c)(3). The acquiring person must determine a FMV in good faith on a commercially reasonable basis. We cannot endorse a particular FMV methodology, since the acquiring person is in the best position to assess the facts applicable to valuation and should be prepared to defend its methodology if challenged.

From: HSRHelp <HSRHelp@ftc.gov>
Sent: Wednesday, August 16, 2023 12:38 PM
To: Walsh, Kathryn E. <kwalsh@ftc.gov>; Berg, Karen E. <KBERG@ftc.gov>; Musick, Vesselina <vmusick@ftc.gov>; Shaffer, Kristin <kshaffer@ftc.gov>; Sheinberg, Samuel I. <SSHEINBERG@ftc.gov>; Six, Anne <asix@ftc.gov>; Whitehead, Nora <nwhitehead@ftc.gov>; Fetterman, Michelle <mfetterman@ftc.gov>
Subject: FW: Valuation of Newly Issued Stock

From: [redacted]
Sent: Wednesday, August 16, 2023 12:38:07 PM (UTC-05:00) Eastern Time (US & Canada)
To: HSRHelp <HSRHelp@ftc.gov>
Subject: Valuation of Newly Issued Stock

Dear PNO:

We have some questions about how to value newly-issued, non-registered, non-publicly traded shares of an issuer that also has publicly traded shares.

Facts

The issuer has been experiencing financial difficulties and may become insolvent if it does not receive a cash infusion in the coming days. The issuer has lined up a total of $350 mm in loan financing commitments from a current investor and third party lenders. In connection with the loans, the lenders will receive in total 480 million shares of newly issued, unregistered common stock for no additional consideration. The 480 million in new shares being issued will have the same terms as the issuer’s publicly trading shares, and after issuance will represent approx. 95% of the outstanding voting securities of the issuer.

The newly issued stock will be registered in due course after issuance (likely in the next few months). In most cases like this, the lenders would get penny warrants or something similar, but here they are getting common stock that qualifies for an exemption from the New York Stock Exchange rule that would otherwise require a stockholder vote for the stock issuance.

The issuer has publicly traded voting shares that are trading around $1.50. There are approximately 25 million shares outstanding, so the current “market cap” for the entire company is around $38 mm. After the financing and issuance of new shares the issuer will have approx. 505 million of shares outstanding. Because so many new shares are being issued, the 25 million currently outstanding shares will be materially diluted.

One of the new third party lenders will receive 180 million shares of newly issued, unregistered common stock for no additional consideration in connection with its loan. These shares will represent approx. 36% of the outstanding voting securities of the issuer.

The issue presented here is the valuation of the newly issued voting securities under the HSR Rules.

HSR Rules

We note that the HSR Rules establish the following methodology for valuing *publicly traded* shares:

(i) If the acquisition price has been determined, then the value shall be the market price or the acquisition price, whichever is greater; or

(ii) if the acquisition price has not been determined, the value shall be the market price.

We also note the HSR Rules establish the following methodology for valuing *non-publicly traded* shares:

(i) If the acquisition price has been determined, then the value shall be the acquisition price; or

(ii) If the acquisition price has not been determined, then the value shall be the fair market value.

Question Presented

Our questions are:

Are the non-registered shares to be issued considered publicly traded or non-publicly traded?

We believe they are non-publicly traded shares for HSR purposes because they cannot be sold on a national securities exchange or quoted in an interdealer quotation system; please confirm.

We believe that if the shares are deemed to be publicly traded, the value would be the greater of the market price or the acquisition price; please confirm.

If these are non-publicly traded shares, should the non-registered shares that are being issued without consideration be valued at their acquisition price or fair market value?; and if FMV is appropriate, can an acquiring person not use the current trading price or the market price of the registered shares as a proxy for the FMV if it believes in good faith that the FMV is different than the current public trading price?

As noted above, the shares are being issued for no additional consideration in connection with an ordinary course, third party loan. The parties have agreed on an acquisition price of $0.00 for these shares. In most cases like this, the lenders would get penny warrants or something similar, which would not be reportable at issuance, and would have an HSR value of $0.01 or similar upon exercise. Thus, we believe the shares to be issued in this financing have a determined acquisition price of $0.00.

If for some reason the PNO would deem that the acquisition price has not been determined, the fair market value would apply. In our transaction, the lenders believe the issuance of 480 million shares (resulting in approximately 505 million outstanding, giving effect to other issuances at the time of this financing) will materially dilute the outstanding shares so neither the current trading price nor the market price would be a reasonable proxy for the fair market value of the shares they will receive.

In this situation do you agree that the lenders need not use the market price of the publicly issued shares to determine the FMV of the newly issued shares if they believe in good faith that the market price of the publicly traded shares is not an accurate proxy for the FMV of the newly issued shares?

PNPM #35 addresses restricted stock awards, and notes that they "are not publicly traded (i.e., the recipient cannot sell the stock prior to vesting)" so the HSR value of the restricted stock is the fair market value according to 801.10(c)(3). The guidance goes on to state that the current trading price of the publicly traded stock is an appropriate proxy for the fair market value of the restricted stock, but it does not *require* that the current trading price be used, or say that it is the *only* appropriate proxy for fair market value.

Informal interpretation 0906006 is not exactly on point because in that transaction newly issued buyer shares were being used as merger consideration. In that interpretation the PNO's guidance was to use the buyer's market price as the value of the shares to be issued to seller's shareholders https://www.ftc.gov/legal-library/browse/hsr-informal-interpretations/0906006. Again, we understand this guidance to be that one could (but does not have to) use the market price as a proxy for the fair market value of the non-publicly traded shares to be issued.

Please let us know if you agree the acquisition price applies, and it is $0.00, or if the buyer must determine the shares' fair market value they are not required to use the trading price of the pre-issuance publicly listed shares. Let us know if you have any questions.

Best regards,

[redacted]

[redacted]

[redacted]